

Red & Tan Charters, Inc. and Local 456, International Brotherhood of Teamsters, AFL-CIO and Local 270, Retail, Wholesale, Warehouse and Production Employees International Union, Party in Interest. Case 2-CA-26331

August 15, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On February 1, 1994, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions and a supporting brief, and both the General Counsel and the Charging Party Union have filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Red & Tan Charters, Inc., Carmel, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Richard L. DeSteno, Esq., for the General Counsel.

David Lew, Esq. (Peckar & Abramson, P.C.), of River Edge, New Jersey, for the Respondent.

Wendell Shepherd, Esq. (Roy Barnes, P.C.), of Bronx, New York, for Charging Party Local 456.

Larry Cole, Esq. (Cole & Cole), of Jersey City, New Jersey, for Local 270.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in New York, New York, on December 20, 1993. The complaint alleges that Respondent, in violation of Section 8(a)(1), (2), and (3) of the Act, recognized and enforced a collective-bargaining agreement with Local 270, threatened employees with discharge or with refusal to employ, assisted Local 270 and refused to consider certain employees for employment. Respondent denies the material allegations of the complaint.

On the entire record, including my observations of the demeanor of the witnesses, and after due consideration of the briefs filed by General Counsel, Charging Party, and Respondent on January 24, 1994, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with a place of business in Carmel, New York, is engaged in the operation of interstate bus transportation of passengers. Respondent annually derives gross revenues in excess of \$100,000. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that Local 456, International Brotherhood of Teamsters, AFL-CIO (Local 456) and Local 270, Retail, Wholesale, Warehouse & Production Employees International Union (Local 270) are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

For a number of years up to December 31, 1992, ATC Management Corp. had provided interstate passenger bus service and school-related transportation to Putnam County, New York. The employees of ATC were represented by Local 456. In the latter part of 1992, Putnam County awarded the contract to provide bus service to Respondent Red & Tan Charters, Inc. Red & Tan was to commence providing service on January 1, 1993. On November 16, 1992, Red & Tan signed a collective-bargaining agreement with Local 270; the labor contract had a term from November 16, 1992, to November 16, 1996. The agreement provided that Red & Tan recognized the Union as the exclusive bargaining representative of employees in the following unit:

All [Red & Tan] drivers, maintenance employees and bus monitors, excluding all office and clerical employees, starters, road men, dispatchers, watchmen, guards, aides, professional employees and all supervisory workers, as defined in the Labor-Management Relations Act of 1947, as amended.

ATC had employed coach (or bus) drivers, van drivers, monitors, and mechanics. The coach drivers and mechanics worked full time and had what their Union, Local 456, considered a full benefit package. The coach drivers drove interstate vehicles. The van drivers and monitors did not work full time, they earned a lower rate of pay and fewer benefits. Vans were used to transport handicapped children and adults to schools and activities; they had only 16 seats, a smaller capacity than the coaches. The monitors rode vans and assisted the handicapped individuals. Local 456 enrolled van drivers and monitors as associate members of the Union.¹

On October 5, 1993, Judge McKenna of the Southern District of New York issued a temporary injunction pursuant to Section 10(j) of the Act which dealt with many of the same matters covered by the instant proceeding.

B. The Facts

Patricia Maher, a van driver for ATC, testified that in December 1992, at the Fair Street facility in Putnam County,

¹ At the end of December 1992, ATC employed about 15 van drivers and about 12 coach drivers out of a total of about 47 employees.

she met Bill Giordenango, a supervisor of Red & Tan.² Giordenango was giving out employment applications to the current ATC employees. Maher completed an application form and handed it in. One week later, about the third week of December 1992, Giordenango telephoned Maher and the two met for an interview. After some discussion about the wages and benefits offered by Red & Tan, Maher mentioned that she belonged to Local 456 and asked if the Union would remain with the employees.³ Giordenango replied that he did not know. In response to Giordenango's question whether Maher would want to work for Red & Tan, Maher replied that she would let him know.

Maher attended an employee meeting conducted by Red & Tan at the Fair Street facility on January 2, 1993. There were about 50 prospective employees in attendance, of whom about 15 had worked for ATC. Red & Tan distributed employment applications and told the people to fill them out. Included with the application materials was an authorization card for Local 270. In response to Maher's question whether she had to belong to Local 270, Red & Tan Manager Larry Bellack responded that she had to belong to that Union; if one did not belong to Local 270, one did not work for Red & Tan. Maher inquired whether there was an initiation fee, and Bellack said the fee was \$25 and that the monthly dues were \$17.40. There were no Local 270 representatives present. As Maher left the Fair Street facility, she told Giordenango that she would not work for him because his labor practices were poor. Maher testified that she did not want to sign a card for Local 270 and that she understood that she could not be employed by Red & Tan unless she signed the card.

According to Maher, Red & Tan hired former ATC coach driver Flossie Moore in October 1993, and it hired former ATC coach driver Nancy Sands about 1 week before the instant hearing in December 1993. Red & Tan also hired former ATC van driver Bruce Acisela.

Mae Guarino, a former van driver for ATC, testified that she attended the Fair Street meeting on January 2, 1993. There was a question and answer session with officials of Red & Tan, including Bellack and Giordenango. When Pat Maher asked Bellack whether they had to sign union cards, Giordenango replied that people had to sign the card if they wanted to work for Red & Tan. The prospective employees had been given a packet of materials to fill out including a W4 form, an immigration form, an application for employment form, and a card for Local 270; Giordenango said the union card was part of the package. Guarino filled out the authorization card and she was hired on January 4 as a van driver. In late January or early February 1993, Local 270 representatives came to Fair Street and discussed dues and a contract. Guarino told them that she did not want to belong to Local 270, but they replied that she had to belong to have a job at Red & Tan.

Guarino estimated that of the approximately 47 ATC employees, about 12 or 14 went to work for Red & Tan in January 1993. Red & Tan employs 12 to 14 coach drivers; none

of these were former ATC coach drivers until Flossie Moore was hired by Red & Tan in the fall 1993 and Nancy Sands was hired about 1 week before the instant hearing.

Victoria Hooten, a bus monitor for ATC, testified that in mid-December 1992, Giordenango came to the Fair Street facility and distributed applications for Red & Tan. Hooten completed an application but she did not hear from Red & Tan thereafter. During the last week in January 1993, Hooten went to Fair Street and spoke to Red & Tan General Manager Irene Morris and Manager John Deacon. Deacon handed Hooten an application whereupon Hooten asked him why she had to fill out another application since she had already handed one in. Deacon replied that they had thrown those away. Hooten was then hired by Red & Tan as a bus monitor. One day after she began work, Red & Tan dispatcher Ed Scott gave her an authorization card for Local 270 and told her to fill it out. Hooten complied and returned the form to Scott the next day. Dues were deducted from Hooten's paycheck from that time until November 1993.

Hooten testified that in mid-February 1993, she asked Irene Morris whether former ATC coach drivers would be hired if they applied for jobs. Morris replied that Red & Tan would not hire ATC coach drivers. Hooten stated that in the fall 1993, Red & Tan hired Flossie Moore and that in December 1993, Nancy Sands was hired. Bob Simmons, a former ATC coach driver, was hired by Red & Tan as a mechanic. Bruce Acisela, who began as a van driver but later became a coach driver for ATC, was hired as a coach driver by Red & Tan.

Terence Powers, who had never worked for ATC, was hired by Red & Tan as a coach driver. Powers was interviewed by Giordenango in early December 1992; the two men discussed Powers' qualifications and Giordenango told Powers that a good contract was being negotiated between Red & Tan and the Union.⁴ In mid-December, Powers attended a meeting at the Ramada Inn in Danbury, Connecticut, where he met Managers Bellack and Deacon. Powers was given a packet of papers to fill out, including an authorization card for Local 270. Bellack instructed Powers to sign the card and told him that all employees would be members of this Union. Powers signed the card. Powers attended a series of training sessions with about 10 or 12 other employees over the next few weeks. He was paid for his time. According to Powers, at about Christmas time, Red & Tan representatives told the employees that most of the drivers had been hired, but that the Company still needed some monitors and that employees should spread the word. Powers began work for Red & Tan the first Monday in January 1993. About 1 month later, Local 270 representatives came to Fair Street to meet the employees. They did not know anything about the contract and could not answer questions about employee benefits and rights; however, they said that a good contract had been negotiated, that it was being printed, and that it would soon be available to the employees. One month later, Powers received a copy of the collective-bargaining agreement between Red & Tan and Local 270.

Raymond Stahl, the business agent for Local 456, testified that he called Bellack in September 1992, when he learned

²The Fair Street facility is apparently the location where drivers report for work and where the contractor which provides bus service to the county maintains its offices during the term of the contract.

³Giordenango informed Maher that wages would be \$9 per hour for full-time employees and \$8.50 per hour for part-time, and that employees would pay 15 percent of the cost of health insurance.

⁴Powers' affidavit given to a Board agent states that Giordenango told him that there was a good contract in effect between Local 270 and the Company.

that Red & Tan had obtained the contract to provide service in Putnam County. Bellack never responded to Stahl although Stahl called repeatedly. In mid-November 1992, Stahl went to Fair Street where the employees told him that according to Giordenango, Red & Tan would be a union employer. Stahl stated that he was introduced to Giordenango on this occasion, that he gave his business card to Giordenango and that he told him Local 456 was the bargaining agent of the employees.⁵ Stahl also mentioned to Giordenango that he had been trying to contact Bellack without success. Stahl's affidavit apparently states that this occasion occurred on December 12, 1992. Stahl testified that on December 15, he saw Giordenango at Fair Street again and that he waited for Bellack but the latter never came to the office.

The documentary evidence shows that dues were deducted by Respondent and remitted to Local 270 beginning in February 1993, and ending at the time Judge McKenna issued his Order in October 1993.

Respondent Red & Tan did not call any witnesses. Further, Respondent refused to turn over to counsel for the General Counsel material sought pursuant to a subpoena duces tecum.⁶ The subpoena requested the payroll records of Respondent and the names and job classifications of employees of Respondent, including their dates of employment, for the period from July 1, 1992, to June 30, 1993. As a result of Respondent's refusal, I permitted counsel for the General Counsel to introduce secondary evidence relating to these subjects.

C. Discussion and Conclusions

The record shows that Red & Tan was actively recruiting and hiring employees in December 1992, and January 1993. There is no evidence that any employees were hired before mid-December 1992.⁷ Yet, it is undisputed that Red & Tan and Local 270 signed a collective-bargaining agreement covering the employees who provided interstate and school-related transportation to Putnam County effective November 16, 1992. Thus, on the record before me, it is clear that Respondent signed the collective-bargaining agreement with Local 270 recognizing it as the exclusive representative of its employees before it commenced operations on January 1, 1993, and before it had hired any employees. Respondent thus violated Section 8(a)(2) and (1) of the Act by giving unlawful support to Local 270 and interfering with the organizational rights of its employees. *Special Service Delivery*, 259 NLRB 993, 994 (1982). Respondent also violated Section 8(a)(3) and (1) of the Act by executing and maintaining in effect, at a time when Local 270 did not represent an uncoerced majority of Respondent's employees, the contract with Local 270 which contains union-security and dues-checkoff clauses. Maintenance of these contract clauses encourages membership in Local 270 and discourages membership in other labor organizations. *Triangle Sheet Metal Works Division*, 237 NLRB 364 (1978).

⁵ Stahl told Giordenango that he had authorization cards from 43 ATC employees.

⁶ Respondent did not file a petition to revoke the subpoena pursuant to the Board's Rules.

⁷ Because Respondent refused to produce its payroll records, secondary evidence was used to establish these facts.

Respondent Red & Tan argues in its brief that its contract with Local 270 covered multiple worksites with a single bargaining unit and that Red & Tan may have been legally required to recognize Local 270 when it took over the Putnam County work. Suffice it to say that no shred of evidence and no arguments were presented at the instant hearing to show that Red & Tan has more than one work location nor that Red & Tan has any employees other than the ones providing service to Putnam County out of the Fair Street location. The contract between Red & Tan and Local 270 does not shed any light in this area. General Counsel having presented a prima facie case that it was unlawful to recognize Local 270 before any employees were hired, the burden then shifted to Respondent to show that it did indeed have other locations and other employees and to make the case that the Putnam County employees were part of a large bargaining unit. This it utterly failed to do.

Similarly, Respondent Red & Tan argues that General Counsel had a duty to introduce any authorization cards for Local 270 signed by employees in order to show that Local 270 did not have a majority when it was recognized on November 16, 1992. However, the record evidence shows that Red & Tan had no unit employees on November 16, 1992; therefore, it was unnecessary to show, additionally, that a majority of cards for Local 270 were not signed as of that date.

The evidence shows that employees who were hired in December 1992, and January 1993, were told by supervisors and managers of Respondent that they had to sign authorization cards for Local 270 in order to work for Red & Tan and that if they did not belong to Local 270 they could not work for Red & Tan. The evidence shows that Red & Tan enforced the union-security provisions of the contract by deducting dues from the employees' paychecks and remitting the sums to Local 270. By these actions Respondent violated Section 8(a)(3), (2), and (1) of the Act. *A.M.A. Leasing*, 283 NLRB 1017 (1987).

General Counsel contends that Red & Tan did not hire any ATC coach drivers because those employees were full members of Local 456. In support of this allegation, General Counsel points to the fact that Deacon told Hooten that Respondent had thrown out prior applications submitted by ATC employees and that in February 1993, Morris said that former ATC coach drivers would not be considered for employment by Red & Tan. However, the record shows that ATC coach driver Bob Simmons was hired by Red & Tan and that Bruce Acisela, who had driven a van for ATC but later had been a coach driver, was hired as a coach driver by Red & Tan. Additionally, some weeks before the instant hearing, Sands and Moore, both former ATC coach drivers, were hired by Red & Tan. Further, the earlier applications may have been thrown out for any one of a number of reasons; discarding those applications does not show that Red & Tan was targeting the ATC coach drivers as applicants it would not hire. Moreover, Morris' statement that ATC coach drivers would not be employed by Red & Tan is belied by the fact that Respondent hired four ATC coach drivers. Finally, it has not been shown that any ATC coach drivers applied for employment with Red & Tan and were rejected. I note that Local 456 did not purport to make application on behalf of the coach drivers for employment with Red & Tan. I conclude that General Counsel has not made out a prima

facie case that Red & Tan refused to consider the former ATC coach drivers for employment nor that Red & Tan refused to hire the coach drivers.

CONCLUSIONS OF LAW

1. By executing a collective-bargaining agreement with Local 270 and recognizing Local 270 as the exclusive representative of its employees before it hired any employees, Respondent violated Section 8(a)(2) and (1) of the Act.

2. By executing and maintaining in effect, at a time when Local 270 did not represent an uncoerced majority of Respondent's employees, the contract with Local 270 including union-security and dues-checkoff clauses, Respondent violated Section 8(a)(3) and (1) of the Act.

3. By informing its employees that they must join Local 270 and threatening them with discharge if they did not join Local 270, and by deducting dues from employees' paychecks and remitting the sums to Local 270, Respondent violated Section 8(a)(3), (2), and (1) of the Act.

4. General Counsel has failed to prove that any other violations of the Act were committed.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent must reimburse its present and former employees for all initiation fees, dues, and other moneys which may have been exacted from them on behalf of Local 270, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

The Respondent, Red & Tan Charters, Inc., Carmel, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Assisting or supporting Local 270 by recognizing or bargaining with such labor organization as the exclusive representative of its employees for the purpose of collective bargaining unless and until Local 270 is certified by the Board as the collective-bargaining representative of its employees pursuant to Section 9(c) of the Act.

(b) Maintaining or giving any force and effect to the collective-bargaining agreement between Respondent and Local 270 dated November 16, 1992, or any extension or modification thereof; provided, however, that nothing in this Order shall authorize or require the withdrawal or elimination of any wage increase or other benefits, terms, and conditions of employment which may have been established pursuant to the performance of the contract.

(c) Withholding from the pay of any of its employees union dues or other union fees or assessments which have been deducted because of any obligation of membership in

⁸If no exceptions are filed as provided by Sec. 102.46 of the Boards Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Local 270, and paying to Local 270 any dues, fees, or assessments which have been deducted from the pay of its employees.

(d) Informing its employees that they must join Local 270 in order to work for Red & Tan and threatening them with discharge if they do not join Local 270.

(e) Distributing union authorization cards to employees and soliciting them to sign union authorization cards.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw and withhold all recognition from Local 270 as the collective-bargaining representative of its employees unless and until Local 270 has been duly certified by the Board as the exclusive representative of such employees.

(b) Reimburse all former and present employees for all initiation fees, dues, assessments, and other moneys, if any, paid by or withheld from them, with interest in the manner provided in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(d) Post at its Fair Street facility in Putnam County copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

⁹If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT assist or support Local 270 by recognizing or bargaining with it as the exclusive representative of our employees unless and until Local 270 is certified by the National Labor Relations Board as the collective-bargaining representative of our employees.

WE WILL NOT maintain or give any force or effect to the collective-bargaining agreement with Local 270 dated November 16, 1992; provided, however, that we shall not withdraw or eliminate any wage increase or other benefits, terms, and conditions of employment which may have been established pursuant to the performance of the contract.

WE WILL NOT withhold from the pay of our employees union dues or other union fees or assessments which have been deducted because of any obligation of membership in Local 270, and WE WILL NOT pay to Local 270 any dues,

fees, or assessments which have been deducted from the pay of our employees.

WE WILL NOT inform our employees that they must join Local 270 in order to work for Red & Tan and WE WILL NOT threaten our employees with discharge if they do not join Local 270.

WE WILL NOT distribute union authorization cards to our employees and solicit them to sign such cards.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL withdraw and withhold all recognition from Local 270 as the collective-bargaining representative of our employees unless and until Local 270 has been duly certified by the National Labor Relations Board as the exclusive representative of such employees.

WE WILL reimburse all former and present employees for all initiation fees, dues, assessments, and other moneys, if any, paid by or withheld from them, with interest.

RED & TAN CHARTERS, INC.